



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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FEB 26 2009

Randy Pullen, Chairman
Arizona Republican Party
3501 North 24th Street
Phoenix, AZ 85016

RE: MUR 5840
Ellen Simon for Congress
and Gael Summer, in his official
capacity as treasurer;
Ellen Simon

Dear Mr. Pullen:

This is in reference to the complaint filed by Matt Salmon, the former Chairman of the Arizona Republican Party ("ARP"), on behalf of ARP with the Federal Election Commission on October 11, 2006, concerning Ellen Simon and Ellen Simon for Congress ("the Committee"). Based on that complaint and in the course of carrying out its supervisory responsibilities, on August 1, 2007, the Commission found that there was reason to believe that Ellen Simon for Congress and its treasurer violated 2 U.S.C. § 434(b) by misreporting a \$50,000 loan from Ellen Simon and a \$225,000 bank loan guaranteed by Ms. Simon, as contributions from Ms. Simon, and by failing to exercise best efforts in obtaining contributor information. The Commission also found there was reason to believe that the Committee and Ms. Simon, each violated 2 U.S.C. § 441a-1(b) for the untimely filing of a 24-Hour Notice of Expenditure from Candidate's Personal Funds.

On June 26, 2008, the Supreme Court issued its decision in *Davis v. FEC*, 128 S. Ct. 2759 (2008) and found Sections 319(a) and 319(b) of the Bipartisan Campaign Reform Act of 2002 — the so-called "Millionaires' Amendment" (the "Amendment") — unconstitutional because they violate the First Amendment to the U.S. Constitution. The Court's analysis in *Davis* precludes enforcement of the reporting requirements of the Amendment. Therefore, after considering the circumstances of this matter, the Commission determined on September 11, 2008, to take no further action as to the Committee and Ellen Simon in connection with 2 U.S.C. § 441a-1(b). In addition, because this was the Commission's only finding with respect to Ms. Simon, the Commission also determined to close the file as to Ms. Simon.

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After considering the circumstances of this matter, the Commission, on February 6, 2009, determined to take no further action as to the Committee with respect to the 2 U.S.C. § 434(b) reason to believe finding regarding the failure to submit contributor information and for misreporting loans. The Commission also closed the file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analyses explaining the bases for the Commission's decisions are enclosed.

The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. See 2 U.S.C. § 437g(a)(8).

If you have any questions, please contact me at (202) 694-1598.

Sincerely,

Thomasenia P. Duncan
General Counsel



BY: Peter G. Blumberg
Assistant General Counsel

Enclosures:
Factual and Legal Analyses

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1 **A. Filing of First Report**

2 Ellen Simon was a 2006 Congressional candidate in Arizona's 1st congressional district.
3 She filed a Statement of Candidacy and Statement of Organization on May 3, 2006. The
4 Committee filed its first report, the 2006 July Quarterly Report, on July 14, 2006. In that report,
5 the Committee disclosed contributions totaling \$503,326, the first of which was on May 5, 2006,
6 from the candidate, in the amount of \$50,000.

7 The Complaint alleged that the Committee should have filed a report with the FEC as
8 soon as the Committee raised or spent \$5,000 instead of reporting the receipt of the \$50,000 in
9 the July Quarterly Report, which was the Committee's next-scheduled report. In its response to
10 the Complaint, the Committee asserted that it was not required to notify the FEC when it reached
11 \$5,000 in contributions or expenditures.

12 Pursuant to 2 U.S.C. § 434(a)(2)(A)(iii), campaign committees for House of
13 Representative candidates shall file Quarterly Reports by the 15th day following the close of the
14 calendar quarter. *See also* 11 C.F.R. § 104.5(a). Simon became a candidate when she filed her
15 Statement of Candidacy on May 3, 2006. Therefore, the first report the Committee was required
16 to file was the July Quarterly Report, which it filed in a timely fashion on July 14, 2006.

17 Contrary to the Complaint's assertion, the receipt or expenditure of \$5,000 did not trigger a
18 requirement that the Committee file a report prior to the July Quarterly Report. Accordingly,
19 there is no basis to conclude that the Committee violated the reporting requirements of the Act
20 with respect to the filing of the Committee's first report.

21 **B. The Loans and the 24-Hour Notice**

22 In its 2006 July Quarterly Report, the Committee reported that Simon made two
23 contributions to her campaign: the \$50,000 contribution on May 5, 2006 discussed above and a

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1 \$225,000 contribution on June 29, 2006. The \$225,000 contribution was funded by a draw on a
2 revolving line of credit from Wells Fargo Bank. The line of credit was secured by Simon's
3 residence. The Committee reported both transactions as contributions from the candidate of her
4 own personal funds.

5 On August 21, 2006, Simon made a second draw on the line of credit, in the amount of
6 \$250,000, and again used the money for her campaign. Six days later, on August 27, 2006, the
7 Committee filed a 24-Hour Notice, in which it disclosed the \$250,000 expenditure. The
8 \$250,000 expenditure brought total personal funds expended by the candidate to \$525,000.

9 On August 31, 2006, the Committee filed an amendment to the July Quarterly Report, in
10 which it re-characterized the \$50,000 contribution made on May 5th as a loan from the candidate
11 and the \$225,000 contribution made on June 29th as a loan from Wells Fargo Bank, guaranteed
12 by the candidate. The following day, the Committee filed another amended July Quarterly
13 Report, to which it attached a copy of the Wells Fargo Bank loan agreement. In memoranda
14 attached to the each of the amended reports, the Committee explained, "loans to the Committee
15 were initially reported as Candidate Personal Funds in error" and, with respect to the Wells
16 Fargo transaction, stated that it was "Originally reported as a loan from the Candidate in error.
17 This deposit was in fact a drawdown from a loan guaranteed from [sic] the Candidate."

18 With respect to the candidate's loans, the Complaint alleged that Ms. Simon intentionally
19 misrepresented the facts when her Committee reported the \$275,000 as a contribution from the
20 candidate of personal funds rather than a bank loan. In its response to the Complaint, the
21 Committee admitted that the loan was originally erroneously reported as a personal contribution
22 from the candidate. The Committee stated that the error was inadvertent and was remedied. It
23 asserted that it cooperated fully with RAD, providing it with all the information that it sought.

1 **1. Reporting of Loans**

2 **The Act requires an authorized committee to report contributions from its candidate, loans**
3 **made or guaranteed by its candidate and all other loans. 2 U.S.C. § 434(b)(2)(B), (G), and (H).**
4 **These loans must be reported on Schedule C. 11 C.F.R. § 104.3(d). When a candidate obtains a**
5 **loan from a lending institution and uses those funds in his or her campaign, the loan must be**
6 **itemized as a loan from the lender to the committee, rather than as a loan from the candidate to the**
7 **committee. 2 U.S.C. § 434 (b)(3)(E); 11 C.F.R. § 104.3(a)(3)(vii)(B) and (a)(4)(iv). Details of such**
8 **loans must be reported on Schedule C-1. 11 C.F.R. § 104.3(d)(1).¹**

9 **In this instance, the candidate's \$50,000 loan and the \$225,000 draw on the Wells Fargo**
10 **Bank home equity line of credit were first reported, erroneously, as contributions from the**
11 **candidate, rather than loans. Subsequently, the Committee filed amended reports that disclosed**
12 **that the funds consisted of a loan from the candidate and a bank loan. The Complaint cited no**
13 **evidence, nor is there any available information, in support of its claim that this violation was**
14 **intentional. Nevertheless, the \$275,000 was improperly reported in the original 2006 July**
15 **Quarterly Report. Accordingly, there is reason to believe that Ellen Simon for Congress and**
16 **Carter Olson, in his official capacity as treasurer, violated 2 U.S.C. § 434(b) by failing, in the**
17 **original 2006 July Quarterly Report, to report the \$50,000 as a loan from Simon to her campaign**

¹ **Schedule C-1 requires that the following information be disclosed: (1) the date and amount of the loan or line of credit; (2) the interest rate and repayment schedule of the loan, or each draw on the line of credit; (3) the types and value of traditional collateral or other sources of repayment securing the loan or line of credit and whether that security interest is perfected; and (4) an explanation of the basis of the credit established if the bases in (3) are not applicable. 11 C.F.R. § 104.3(d)(1)(i)-(iv). The committee treasurer must sign the schedule on Line G and attach a copy of the loan agreement. 11 C.F.R. § 104.3(d)(2). The lending institution must sign the statement on Line I, attesting that: the terms of the loan and other information regarding the extension of the loan are accurate, the terms and condition of the loan are no more favorable than those extended to similarly situated borrowers, the lending institution is aware that the loan must be made on a basis which assures repayment, and that in making the loan it has complied with the regulations set forth at 11 C.F.R. §§ 100.7(b)(11) and 100.8(b)(12).**

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1 and the \$225,000 as the proceeds of a home equity line of credit from Wells Fargo Bank to
2 Simon.

3 **2. 24-Hour Reporting Requirement**

4 In a Request for Additional Information ("RFAI"), dated September 19, 2006, RAD
5 explained that 24-Hour Notices must be filed when a candidate for the House of Representatives
6 makes more than \$350,000 in expenditures from personal funds and noted that the 24-Hour
7 Notice the Committee filed on August 27, 2006 appeared to have been filed outside of the 24-
8 hour period. In response to the RFAI, a consultant to the Committee confirmed that the
9 Committee had exceeded the \$350,000 reporting threshold on August 21, 2006 and stated that
10 Committee staff had not notified him of the expenditure that triggered the 24-hour reporting
11 requirement until August 27, 2006.

12 When a candidate for the United States House of Representatives "makes or obligates to
13 make an aggregate amount of expenditures from personal funds in excess of \$350,000 in
14 connection with any election" the candidate or his authorized committee must notify the
15 Commission by filing a notification of the expenditure (FEC FORM 10) with the Commission
16 within twenty-four hours after exceeding the threshold. 2 U.S.C. § 441a-1(b)(1)(C); 11 C.F.R.
17 § 400.21(b). An expenditure from personal funds includes direct contributions as well as loans
18 made by a candidate using personal funds or a loan secured using such funds to the candidate's
19 authorized committee.² 2 U.S.C. § 441a-1(b)(1)(A); 11 C.F.R. § 400.4. The committee must
20 also send copies of the FEC FORM 10 to each opposing candidate and the national party of each
21 such candidate within 24 hours of the expenditure. 2 U.S.C. § 441a-1(b)(1)(F); 11 C.F.R.

² The term "personal funds" includes amounts derived from any asset that, under applicable State law, at the time the individual became a candidate, the candidate had right of access to or control over, and with respect to which the candidate had legal and rightful title or an equitable interest. 11 C.F.R. § 100.33.

1 § 400.21(b). Although the notification is signed by the committee treasurer, the candidate is
2 responsible for ensuring that it is timely filed by his or her principal campaign committee.
3 11 C.F.R. § 400.25.

4 In this matter, the 24-Hour Notice was filed five days late. The candidate made the
5 second draw on the Wells Fargo home equity line of credit and forwarded the resulting \$250,000
6 to her committee on August 21, 2006. The \$250,000 caused Simon to exceed the \$350,000
7 reporting threshold and triggered the requirement that her Committee file notice of the
8 transaction with the Commission and opposing candidates and their parties within 24 hours, *i.e.*,
9 by August 22, 2006. The Committee did not file its 24-Hour Notice until August 27, 2006.

10 Because the Committee did not file a 24-Hour Notice of Expenditure from Candidate's
11 Personal Funds in a timely fashion and because candidates are responsible for ensuring that 24-
12 Hour Notices are timely filed, there is reason to believe that Ellen Simon for Congress and Carter
13 Olson, in his official capacity as treasurer, and Ellen Simon violated 2 U.S.C. § 441a-1(b).

14 **C. Best Efforts**

15 In its 2006 Pre-Primary Report, filed on August 31, 2006, the Committee failed to
16 provide employment or occupation information for 17 contributions out of the 51 contributions
17 disclosed in the reporting period. On September 19, 2006, RAD sent an RFAI to the Committee,
18 acknowledging that the Committee had previously established that it had been using best efforts
19 to obtain occupation and employer information for contributors, but noting that the Pre-Primary
20 Report showed a "significant increase in the number of entries for which the occupations and/or
21 employers are not provided."

22 On October 8, 2006, the Committee filed an amended Pre-Primary Report that included a
23 memorandum entry responding to the RFAI. In that memorandum, the Committee described its

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1 best efforts as follows: original direct mail solicitations include contributor cards that request the
2 required information and explain that federal law requires the Committee to request and report
3 the information; at fundraising events, when checks are received, contributors are asked to fill
4 out the cards; Committee staff follow up on contributions in excess of \$200 by phone on a
5 monthly basis; every 30 days, the Committee sends a letter request for the missing information
6 with forms and a pre-addressed, stamped return envelope; and, if contributor information comes
7 in after the close of the reporting period, the Committee includes the information in an amended
8 report. Nevertheless, the amended Pre-Primary Report provided occupation and employer
9 information for only 2 of the 17 contributions at issue, leaving 15 contributions totaling \$15,150
10 for the reporting period with incomplete contributor information.

11 The Complaint alleged that Simon "has only amended her reports to say 'best effort,' but
12 does not provide documentation that proves she has made this best effort." In response to the
13 Complaint, the Committee reiterated its response to the RFAI, but provided no specific
14 information or documentation for its efforts to obtain the missing contributor information.

15 The Act requires candidate committees to identify persons who make contributions that,
16 when aggregated, exceed \$200 for the election cycle. 2 U.S.C. § 434(b)(3)(A). The Act and the
17 regulations define "identification" to include providing the person's name, address, occupation
18 and name of employer. 2 U.S.C. § 431(13)(a); 11 C.F.R. § 100.12. If the contribution is not
19 accompanied by all of the contributor information required to be reported, the committee must
20 undertake "best efforts" to obtain the missing information. 11 C.F.R. § 104.7. Specifically, the
21 committee treasurer must make at least one effort within 30 days of receipt of the contribution to
22 obtain the missing information; the effort may be in writing or it may be an oral request,
23 documented in writing; it may not include material on any other subject and may not solicit any

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Factual & Legal Analysis

1 contribution; and if in writing, it must clearly ask for the missing information and must be
2 accompanied by a pre-addressed return post card or envelope for the response. 11 C.F.R.
3 § 104.7(b)(2). Written requests for missing information by authorized committees, such as the
4 Committee, must include the language along the following lines:

5 Federal law requires us to use our best efforts to collect and report the
6 name, mailing address, occupation and name of employer of individuals
7 whose contributions exceed \$200 in an election cycle

8
9 or

10 To comply with Federal law, we must use best efforts to obtain, maintain,
11 and submit the name, mailing address, occupation and name of employer
12 of individuals whose contributions exceed \$200 per election cycle.

13
14
15 11 C.F.R. § 104.7(b)(1).

16 In this matter, 15 contributions have deficient contributor information in the Pre-Primary
17 Report. These contributions constitute approximately 30% of total contributions for the period.
18 Furthermore, the Committee has provided no documentation substantiating its efforts to comply
19 with the law. Accordingly, there is reason to believe Ellen Simon for Congress and Carter
20 Olson, in his official capacity as treasurer, failed to exercise best efforts in obtaining contributor
21 information and thus violated the reporting requirements of 2 U.S.C. § 434(b).

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Ellen Simon for Congress MUR: 5840
and Gael Summer, in his official
capacity as treasurer

Ellen Simon

I. BACKGROUND

This matter was generated based on information ascertained by the Federal Election Commission ("the Commission") in the normal course of carrying out its supervisory responsibilities, *see* 2 U.S.C. § 437g(a)(2), and by a complaint filed with the Federal Election Commission by the Arizona Republican Party. *See* 2 U.S.C. § 437g(a)(1).

The Commission previously found reason to believe that Ellen Simon and Ellen Simon for Congress and its treasurer, violated 2 U.S.C. § 441a-1(b), a provision of the Millionaires' Amendment of the Act, by failing to timely file a 24-Hour Notice of Expenditure from the Candidate's personal funds. The Commission also found reason to believe that the Simon Committee violated 2 U.S.C. § 434(b) by misreporting a \$50,000 loan from the Ms. Simon and a \$225,000 bank loan guaranteed by Ms. Simon, as contributions from Ms. Simon, and by failing to provide complete contributor information in its 2006 Pre-Primary Report.

II. DISCUSSION

A. Millionaires' Amendment Provision

On June 26, 2008, the U.S. Supreme Court ruled that the Millionaires' Amendment and its related reporting requirements are unconstitutional. *Davis v. FEC*, 128 St. Ct. 2759 (2008). The statutory provisions pertaining to the Millionaires' Amendment were voided by *Davis*. Accordingly, the Commission determined to take no further action as to Ellen Simon and Ellen

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Simon for Congress, and Gael Summer, in his official capacity as treasurer, in connection with 2 U.S.C. § 441a-1(b).

B. Contributor Information and Best Efforts

The Act requires candidate committees to identify persons who make contributions that, when aggregated, exceed \$200 for the election cycle. 2 U.S.C. § 434(b)(3)(A). The Act and the regulations define "identification" to include providing the person's name, address, occupation and name of employer. 2 U.S.C. § 431(13)(a); 11 C.F.R. § 100.12. If the contribution is not accompanied by all of the contributor information required to be reported, the committee must undertake "best efforts" to obtain the missing information. 11 C.F.R. § 104.7. When a committee treasurer shows that best efforts have been made to obtain such information, the committee is considered to be in compliance with the Act. *Id.* Specifically, the committee treasurer must make at least one effort within 30 days of receipt of the contribution to obtain the missing information: the effort may be in writing or it may be an oral request, documented in writing; it may not include material on any other subject and may not solicit any contribution; and if in writing, it must clearly ask for the missing information and must be accompanied by a pre-addressed return post card or envelope for the response. 11 C.F.R. § 104.7(b)(2). Written requests for missing information must include an accurate statement of Federal law regarding the collection and reporting of individual contributor identifications. 11 C.F.R. § 104.7(b)(1).

During the Commission's investigation of this matter, the Simon Committee provided documentation showing that it had exercised best efforts to obtain missing contributor information. The Committee submitted sample letters that it states were used throughout the campaign and were mailed on a monthly basis to all contributors who gave more than \$200 in an election cycle and failed to provide complete information. The letters show that the Committee

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exercised best efforts to obtain missing contributor information. Accordingly, the Commission determined to take no further action as to Ellen Simon for Congress and Gael Summer, in his official capacity as treasurer, with respect to the 2 U.S.C. § 434(b) reason to believe finding regarding failure to disclose contributor information, and closed the file in this matter.

C. Misreporting of Loans

After considering the circumstances of this matter, the Commission exercised its prosecutorial discretion to take no further action as to Ellen Simon for Congress and Gael Summer, in his official capacity as treasurer, in connection with a violation of 2 U.S.C. § 434(b) for the misreporting of candidate loans. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

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